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No. 97-564

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15(6) of the Rules of the Supreme Court, Petitioner SRS Technologies, Inc. ("SRS")[1] addresses several new points raised by the Respondents in their Opposition to SRS's Petition for Writ of Certiorari (the "Opposition").

SRS's petition concerns SRS Technologies, Inc. v. U.S. Dep't of Defense, No. 96-1484, slip op. (4th Cir. May 6, 1997). In Section

[1] In accordance with S. Ct. R. 29(6), SRS states that it has no parent or subsidiary companies.

II of the Fourth Circuit's opinion, the relevant section, the court held that SRS lacked standing to challenge the constitutionality of an award of a federal contract without competition to a minority-owned concern replacing SRS, the incumbent, because SRS "was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multimillionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." Pet. App. at 4a. Contrary to the Respondents' arguments, the Fourth Circuit did not hold that SRS lacked standing to raise the constitutional issues because SRS was a subcontractor, because it had a task order subcontract, because it had not submitted an actual written proposal to continue its work, or because it needed TRW's cooperation to submit such a proposal. Id.

SRS filed this Petition for Writ of Certiorari, citing Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997). In Dynalantic, Dynalantic sued these same Respondents to enjoin another contract award under the same federal program, i.e., an 8(a) Program set-aside procurement of a flight simulator contract for which Dynalantic wished to compete. Dynalantic was not even the incumbent, as SRS was. Dynalantic asserted that it was denied an opportunity to compete for the contract because the 8(a) Program is a racial preference program that violates the U.S. Constitution. Dynalantic, like Petitioner SRS, could not claim to be

"economically disadvantaged" under the 8(a) Program, 15 U.S.C. § 631 et seq. (1994 and Supp. 1996) (the "Act"). The Respondents argued that Dynalantic lacked standing. The D.C. Circuit held that the Respondents' argument was:

> premised on a mischaracterization of Dynalantic's alleged injury. Appellant has no desire to participate in the 8(a) program. [Citation omitted]. Rather Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms.

Dynalantic, 115 F.3d at 1016 (emphasis added).

In their Opposition, the Respondents concede the central issue in the Petition, i.e., that there is now a conflict between the circuit courts on the important issue of who may challenge the constitutionality of a federal racial preference program. In a vain effort to avoid the implication of their concession, Respondents now claim that SRS challenged the Act's implementing regulations, but not the Act. The Respondents are incorrect, as the record and the Fourth Circuit's opinion demonstrate.

SRS's Complaint expressly stated that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 (1988) because the action "arises under the Constitution and the laws of the United States, including but not limited to the Fifth and Fourteenth Amendments to the

Constitution; 10 U.S.C. § 2323 (1994); Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994)" (emphasis added); see also Brief for Plaintiff-Appellant SRS Technologies, Inc. to the Fourth Circuit ("Appellant's Brief") at 3.[2] In its Complaint, SRS sought to "enjoin Defendant the U.S. Department of Defense ('DoD') from permitting performance of a Government contract based on the alleged economic and racial disadvantage for the prospective contract, in violation of the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution."

SRS's Appellant's Brief also stated that it was challenging the statute and its implementing regulations, as the following exerpts from Appellant's Brief demonstrate:

- "DoD's actions are the result of a racial preference scheme . . . . The primary statutory source of this racial preference is Section 8(a) of the Small Business Act, which authorizes the SBA to enter into 'contracts' with other government departments and agencies, and to subcontract the performance of these contracts to 'small business concern[s] owned and controlled by socially and economically disadvantaged individuals . . . .'

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[2] The Complaint and all briefs submitted to the courts below that are referenced herein have been lodged with this Court.

15 U.S.C. § 637(a)(1)(c) (1994)." Appellant's Brief at 4 (emphasis added).

- "The SBA Act, the DoD quota law, and their implementing regulations create a requirement-in-fact, not readily susceptible of waiver, consideration of merit, or determination of actual need." Id. at 6 (emphasis added).

- "SRS brought this action against DoD and SBA to declare unconstitutional and to overturn this racial preference scheme." Id. at 9.

- "For ease of reference in this brief, the set-aside and racial goals contained in 10 U.S.C. §§ 2323(a) and (e), the Small Business Act, and regulations implementing these laws, are called, collectively, 'the DoD set-aside scheme.'" Id. at 9 n.3 (emphasis added).[3]

The error of Respondents' claim is further evidenced by their own submissions to the Court of Appeals. For example, the Respondents relied on the erroneous lower court decision in Dynalantic, 937 F. Supp. 1 (D.D.C. 1996), in support of their argument to

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[3] Both lower court decisions recognized that SRS is challenging the constitutionality of the 8(a) Program, without limiting this to its statute or its regulations. Pet. App. at 3a & 7a-9a.

the Court of Appeals for the Fourth Circuit that contractors lack standing to raise an equal protection challenge to the 8(a) Program if they are ineligible for the program for any reason other than the Government's alleged use of race-based criteria. Indeed, the Respondents attached a copy of that decision as Exhibit A to their brief in the Fourth Circuit.[4]

In addition, in their Consolidated Brief for the Appellees to the Fourth Circuit ("Appellees' Brief"), the Respondents repeatedly asserted that SRS was challenging the entire 8(a) Program, and not just regulations, e.g.:

- "SRS raises an equal protection challenge to the 8(a) program, specifically attaching a rebuttable presumption that certain racial minorities are 'socially disadvantaged' for purposes of participating in the program." Appellees' Brief at 17-18;

- "SRS argues that the 8(a) program unlawfully discriminates on the basis of race in violation of the equal

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[4] The Respondents concede that the district court's Dynalantic opinion, having been reversed, is no longer applicable. The fact remains that the Respondents relied on it in the Fourth Circuit in connection with SRS's challenge of the 8(a) Program.

protection guarantees of the Fifth and Fourteenth Amendments (Br. 4-8, 17-33)." Id. at 22.

- "In conclusion, SRS lacks standing to challenge the 8(a) program under the Equal Protection Clause . . . ." Id. at 30.

Likewise, in the Defendants' Memorandum in Support of HTS's Motion to Dismiss and in Opposition to SRS's Motion for Summary Judgment ("Opposition to Motion"), the Respondents stated, "SRS Technologies, Inc.'s (SRS's) complaint in this action is limited to the defendants' decision to award a support contract, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), at the Pacific Missile Range Facility (PMRF), to High Technology Solutions, Inc. (HTS)." Opposition to Motion at 1. These excerpts, too, demostrate that the Respondents' claim that SRS challenged only regulations is groundless.[5]

The Opposition also argues a point that was not the basis of the Fourth Circuit's holding

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[5] Equally groundless and incomprehensible is Respondents' claim that "petitioner does not dispute" that it lacks standing to challenge the use of a race-based presumption, in SBA regulations, to determine social disadvantage. Opp. at 7. Unable to come to grips with the central issue in the case, the Respondents frivolously claim that SRS has conceded the issue.

concerning SRS's standing to raise SRS's constitutional challenge -- that SRS lacks standing because SRS was not "ready, willing and able" to compete for the contract at issue.[6] Specifically, the Respondents argue that the terms of SRS's subcontract with TRW somehow render SRS ineligible to compete for the contract. That argument is flawed. First, it speculates about the outcome of events that never occurred, i.e., whether TRW would have blocked SRS from competition when TRW had no motive to do so. Second, it assumes facts contrary to those set forth in SRS's complaint, which are taken as true for purposes of ruling on a motion to dismiss.

The issue of whether SRS was "likely" to receive a contract was not addressed by the Fourth Circuit in its SRS Technologies decision in connection with SRS's constitutional claims. As noted in the Petition, the district court improperly addressed that argument in the context of a motion to dismiss, and ruled that SRS's chance of obtaining a contract was remote, without considering that SRS was the incumbent. As the D.C. Circuit correctly held in Dynalantic, the true test is whether the contractor is denied the opportunity to compete because of a discriminatory policy. Denial of that opportunity causes injury-in-fact. Whether the contractor would "likely" win the award is

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[6] The Fourth Circuit addressed this issue in another section of its decision, not the section concerning SRS's standing to raise its constitutional challenge.

irrelevant to the issue of injury-in-fact and, hence, standing.

CONCLUSION

In both Dynalantic and the present case, a Plaintiff asserted that it was denied an opportunity to compete for a contract because of the same racial preference program in violation of the U.S. Constitution. The D.C. Circuit, in Dynalantic, held the plaintiff had standing to raise such a constitutional challenge. The Fourth Circuit in this case, held the plaintiff, Petitioner, SRS, lacked standing to raise such a constitutional challenge. The Circuits therefore are split as to this issue. This Court should grant certiorari to resolve the conflict concerning standing of a non-Section 8(a) company to challenge the constitutionality of an award of a federal contract without competition to a Section 8(a) company.

Respectfully submitted,

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